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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/699,469	10/31/2003	Heather Lynn Focht	9081M	2774
James J. Napoli, Ph.D. Marshall, Gerstein & Borun LLP 233 South Wacker Drive 6300 Sears Tower Chicago, IL 60606-6357				
EXAMINER				
OGDEN JR, NICHOLUS				
ART UNIT		PAPER NUMBER		
1796				
MAIL DATE		DELIVERY MODE		
06/19/2008		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/699,469

**Applicant(s)**

FOCHT ET AL.

**Examiner**

Necholus Ogden

**Art Unit**

1796

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE three MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 13 March 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-20, 22-24, 26-39 and 41-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20, 22-24, 26-39 and 41-54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB08)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Paper No(s)/Mail Date \_\_\_\_\_
- 6) ☐ Other: \_\_\_\_\_

***Response to Amendment***

1. Claims 7, 13, 18, 26, 32 and 37 rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement is withdrawn.
2. Claims 1-13, 16-20, 22-24, 26-32 and 35-39, 41-54, are rejected under 35 U.S.C. 103(a) as being unpatentable over Mitra (6,534,457) or Hayward et al (6,534,456) in view of Lavaud (5,914,117).

Mitra or Hayward et al discloses a plurality of liquid cleansing compositions in lamellar phase, which are contained in partitionless container. The multiphase composition is stable upon storage and is dispensed as striped product where typically one stripe has a cleansing function and a second stripe has a moisturizing function (see abstract, respectively). Mitra or Hayward et al further teach that said compositions have a viscosity of at least about 80,000 centipoise and are stable for at least 4 months at room temperature (col. 3, line 55-col. 4, line 25 and col. 4, lines 5-47, respectively). With respect to the cleansing compositions, Mitra or Hayward et al teach that said compositions comprise at least 5% by weight of a cleansing composition comprising surfactants (col. 4, lines 49-65 and col. 5, lines 9-25); lamellar structurant such as fatty alcohols, esters or trihydroxystearin (col. 9, lines 15-35 and col. 10, lines 1-10, respectively); emollients in an amount from 0 to 70% by weight and comprise lanolin alcohols, lanolin, triglycerides, esters, silicone oils such as dimethicone and fatty acid oils (col. 9, lines 39-67 and col. 10, lines 18-44, respectively). Mitra or Hayward et al specifically teach that said compositions include titanium dioxide or zinc stearate particles, cationic conditioning agents, antibacterial, antioxidants and viscosity adjusting

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agents (col. 10, lines 4-38 and col. 11, lines 1-25, respectively). With respect to the container, Mitra or Hayward et al teach that said containers are transparent (col. 11, lines 1-5 and col. 12, lines 25-35, respectively). See examples 1 and table 2, respectively).

Mitra or Hayward et al do not specifically teach with sufficient specificity applicant's density of the benefit phase. However, because Mitra or Hayward et al each teach the specific surfactants, emollients in their requisite proportions and absent a showing to the contrary, one of ordinary skill would have expected the compositions to encompass the density since several preferred benefit agents are suggested by Mitra or Hayward. Furthermore, it is held that "it is not necessary in order to establish a prima facie case of obviousness . . . that there be a suggestion or expectation from the prior art that the claimed [invention] will have the same or a similar utility as one newly discovered by applicant," and concluded that here a prima facie case was established because "[t]he art provided the motivation to make the claimed compositions in the expectation that they would have similar properties." 919 F.2d at 693, 16 USPQ2d at 1901.

3. Mitra or Hayward et al do not disclose with sufficient specificity applicant's low density microsphere.
4. Lavaud disclose a composition for face cleansing or shaving comprising an ester; water soluble soaps, and low density modifiers such as expanded microspheres and water (col. 2, lines 39-62 and example 1).

5. Mitra or Hayward et al do not specifically teach with sufficient specificity applicant's stripe size width, Shear Index or Consistence Value. However, because Mitra or Hayward et al each teach the specific surfactants, emollients in their requisite proportions and absent a showing to the contrary, one of ordinary skill would have expected the compositions to encompass applicant's stripe size width, Shear Index or Consistence Value as suggested by Mitra or Hayward. Furthermore, it is held that "it is not necessary in order to establish a prima facie case of obviousness . . . that there be a suggestion or expectation from the prior art that the claimed [invention] will have the same or a similar utility as one newly discovered by applicant," and concluded that here a prima facie case was established because "[t]he art provided the motivation to make the claimed compositions in the expectation that they would have similar properties." 919 F.2d at 693, 16 USPQ2d at 1901. Moreover, It would have been obvious to one of ordinary skill in the art to include the microspheres of Lavaud to the compositions of Mitra or Hayward et al because Lavaud teaches low density modifier in skin cleansing formulations and the skilled artisan would have been motivated to include said low density particles to aid as an exfoliant or to enhance the gel formulations for increase delayed reactions. Accordingly, in the absence of a showing to the contrary, one skilled in the art would have been motivated to combine the references for their intended purpose.
6. Claims 14-15 and 33-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mitra (6,534,457) or Hayward et al (6,534,546) in view of Lavaud (5,914,117) and further in view of Williams et al (6,429,177).

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7. Mitra or Hayward et al do not teach an electrolyte component.
8. Williams et al disclose a separating multiphase wash component composition in a transparent container, wherein said composition comprises surfactants, thickener, polyols, and electrolytes (col. 2, lines 45-col. 3, and line 5). Williams et al teach that said electrolyte comprises salts of sulfates, carbonates and bisulphate's (col. 3, lines 28-33) and in an amount from less than 25% by weight.
9. It would have been obvious to one of ordinary skill in the art to include the electrolyte of Williams et al to the compositions of Mitra or Hayward et al because Mitra or Hayward et al teach multiphase compositions and Hayward et al suggests electrolytes are included in phase separation or portioning layers (col. 2, lines 15-21). Accordingly, in the absence of unexpected results, one of ordinary skill in the art would have been motivated to include the electrolyte to further induce separation of stripes as suggested by Williams et al.

#### ***Response to Arguments***

10. Applicant's arguments filed 3-13-2008 have been fully considered but they are not persuasive.
11. Applicant argues that Mitra and Hayward do not suggest delayed foaming compositions and therefore are not combinable with Lavaud.
12. The examiner contends that Mitra and Hayward are directed toward skin cleansing and Lavaud further suggest facial cleansing as an objective of his composition and therefore the references are analogous.

13. Applicant argues that there is no motivation to include the hollow spheres of Lavaud to the compositions of Mitra or Hayward and further said references do not teach delayed reactions as suggested by Lavaud.

14. The examiner contends that Lavaud teaches that the hollow spheres are included in his facial cleansing composition for the purpose of "improving performance and properties" (col. 2, lines 5-10). This statement proves that said microspheres are not only for delayed reactions but also for improving performances and properties of said gels or creams but also said compositions are used in other accordance's such as facial cleansing. Accordingly, one of ordinary skill in the facial cleansing art, such as Mitra and Hayward would have been motivated to include the hollow spheres for property and performance enhancing benefits in the absence of a showing to the contrary.

15. Applicant argues that each phases requires substantial amounts of water and the claims require substantially anhydrous compositions.

16. The examiner contends that the examples do require high amounts of water in each phases, however, the disclosures of Mitra and Hayward each teach amounts of surfactants and emollients/oils that would clearly make the amounts of water in each phases almost non-existent (see columns 9 and 10 and claim 10 of Hayward). Therefore, it would have been obvious to one of ordinary skill in the art to combine the components in the optimum proportions as claimed since the teachings of Mitra and Hayward suggest such proportion in larger amounts.

17. Applicant argues that Williams teaches away from the claimed invention density requirements and aqueous layers.

18. The examiner contends that said claim requires that the density are "substantially" the same and that said term substantially provides for optimization, wherein the skilled artisan, in the absence of unexpected results, would have optimized said layers to encompass said claimed limitation. With respect to the benefit phase, the Examiner contends that Williams does teach sunflower seed as a benefit agent, however, Williams is only relied upon to show the inclusion of electrolytes in multiphase compositions.

### ***Conclusion***

19. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.



Any inquiry concerning this communication or earlier communications from the examiner should be directed to Necholus Ogden whose telephone number is 571-272-1322. The examiner can normally be reached on M-Thu.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Necholus Ogden/  
Primary Examiner  
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6-14-2008